IN THE

Supreme Court of the United States

October Term, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO, and FRANK J. VANEK,

Petitioners,

v.

JOHN R. NOVOTNY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the court of appeals is reported at 584 F.2d 1235 (3d Cir. 1978) and is attached to the Petition for a Writ of Certiorari as Appendix A (Pet. App. A at 1a-66a).[1] The opinion of the District Court for the Western District of Pennsylvania is reported at 430 F. Supp. 227 (W.D.Pa. 1977), and is attached to the Petition for a Writ of Certiorari as Appendix B (Pet. App. B. at 67a-76a).

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit *en banc* was entered on August 7, 1978. The Petition for a Writ of Certiorari was filed on November 6, 1978 and was granted on January 8, 1979. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the officers and directors of a corporation, admittedly acting only on behalf of that corporation at all relevant times, can form a conspiracy for purposes of 42 U.S.C. § 1985(3)?

2. Whether an alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, is a deprivation of "equal privileges and immunities" for purposes of 42 U.S.C. § 1985(3)?

[1] References to the Appendix to the Petition for a Writ of Certiorari will be made as (Pet. App. .... at ....) and references to the Appendix hereto will be made as (App. .... at ....), with appropriate appendix and page notations.

3. Whether the commerce clause of the Constitution of the United States provides a "source of congressional power" which makes an alleged conspiracy by a private employer to deny women the right to equal employment opportunity actionable under 42 U.S.C. § 1985(3)?

Statutory Provisions Involved

UNITED STATES CODE, TITLE 42

§ 1985. Conspiracy to interfere with civil rights

* * *

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws; or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Statement of the Case

Respondent John R. Novotny ("Novotny"), a former employee and director of corporate Petitioner, Great American Federal Savings and Loan Association ("Association"), instituted this suit in the United States District Court for the Western District of Pennsylvania on December 17, 1976.

In essence, Novotny alleges that the Association and the individual Petitioners, its directors and/or officers, violated Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e (1976), by discriminating against the Association's female employees in promotion opportunities and related aspects of employment (App. A at 3).

At an unspecified meeting of the Association's Board of Directors, Novotny allegedly protested on behalf of the Association's female employees. At the Association's annual meeting, on or about January 22, 1975, the Association and its directors and officers failed to reelect Novotny as an officer and terminated his employment. According to Novotny, the Association and its officers and directors took this action because of his equal employment protest. He alleges that this was in violation of 42 U.S.C. § 1985(3) (1976) and Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a).

The Association moved to dismiss Novotny's Complaint and, on April 22, 1977, the district court granted the Association's motion and entered an order dismissing the Complaint (Pet. App. B. at 76a).

In an opinion accompanying its April 22 order, the district court held that the only alleged act of discrimination which had affected Novotny was his termination by the directors and officers. In the district court's view, this action was not attributable to a conspiracy because the Complaint alleged

that "at all times relevant hereto, the individual defendants were and are acting on behalf of GAF" (App. A at 7, ¶ 33). The Section 1985(3) cause of action was, therefore, dismissed.

The district court also dismissed Novotny's Title VII cause of action grounded upon the retaliation language of 42 U.S.C. § 2000e-3(a). In the district court's view, this provision applied only to discrimination suffered by an individual because he or she "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing" brought under Title VII. Novotny had never alleged that his termination was connected in any way with such enforcement proceedings. Novotny therefore was not a "person aggrieved" and not entitled to relief under Title VII (Pet. App. B at 74a).

An appeal followed the judgment of the district court. It was argued before a three judge panel of the United States Court of Appeals for the Third Circuit on February 16, 1978. It was later ordered that the parties file supplemental briefs, and the case was reargued before the circuit court *en banc* on May 11, 1978.

In an opinion and judgment issued on August 7, 1978, the Third Circuit reversed and remanded the judgment of the district court regarding both causes of action under Section 1985(3) and Title VII.

In reversing the dismissal of the cause of action under Section 1985(3), the Third Circuit held, among other things, that the directors and officers could form a conspiracy despite the allegations in the Complaint; a violation of the substantive rights conferred by Title VII may be remedied under Section 1985(3); and the commerce clause of the United States Constitution is the congressional source of power which makes a private conspiracy to deny women their right to equal employment opportunity actionable under Section 1985(3).

Summary of Argument

I. The civil conspiracy rule that a corporation cannot conspire with itself flows naturally from general corporate law principles. Under such principles a corporation is incapable of acting *except* through its agents and therefore cannot be a separate person conspiring *with* agents working on its behalf for purposes of a civil conspiracy.

Application of this rule has no effect upon the purpose underlying the civil conspiracy: to provide the victim with a more effective means of compensation for the harm suffered. A corporation is already vicariously liable for actions taken by its authorized agents through *respondeat superior.* There is consequently no need to reach collective actions of a corporation through civil conspiracy. To do so, in addition, ignores how a corporation operates and exposes federal courts to needless civil conspiracy litigation over virtually every corporate decision. Matters such as this can be adequately litigated through existing causes of action.

The theory underlying criminal conspiracy, on the other hand, is to *punish* individuals for entering an agreement to perform an unlawful act or lawful act by unlawful means. For that reason, conviction for criminal conspiracy requires *specific intent* to commit the offense. Since the individual motivation must be examined, a person is not shielded from criminal conspiracy liability because of a corporate position which he or she may occupy. Consistent with this, in a criminal conspiracy, an individual will not be presumed liable because he or she occupies a position which might have had some input into the harmful decision.

Specific intent, however, is not an element of a cause of action under 42 U.S.C. § 1985(3). *Griffin v. Breckenridge,* 403

U.S. 88, 102 n.10 (1971). Criminal conspiracy principles are, therefore, not applicable to allegations of civil conspiracy liability.

In addition, other purposes behind criminalization of the agreement are not satisfied in this case. The violation of Title VII alleged here could only be committed by the corporate "employer" through the acts of its agents. The collective action in this case, therefore, creates no greater potential threat to the public.

Despite these considerations, the Third Circuit applied criminal conspiracy principles in the decision below to find the officers and directors of the Association, who admittedly were working on behalf of the Association at all relevant times, capable of conspiring for purposes of Section 1985(3). The Third Circuit felt compelled to reach this strained result because it could not conceive of the corporate form shielding avowed racists from liability. This fear is groundless. The courts can always "pierce the corporate veil" to assess individual liability if the corporation is a sham or if it is organized for unlawful purposes.

Every other circuit court to consider this issue has dismissed the fears of the Third Circuit and applied the traditional civil conspiracy principle that a corporation cannot conspire with its agents for purposes of Section 1985(3).

II. Section 1985(3) originated as Section 2 of the Enforcement Act of 1871. This Act was intended to provide a federal forum for the vindication of the fundamental rights of citizens which the state courts could not or did not want to adequately protect in the Reconstruction South.

Section 1985(3), therefore, was not intended to protect rights conferred by statutes which provide for federal jurisdiction in their own terms. If, for instance, rights flowing from statutes

such as the Labor-Management Relations Act, the Equal Pay Act, and the Age Discrimination in Employment Act which provide for conditional federal jurisdiction can be enforced under Section 1985(3), numerous conflicts will result and the intent of Congress will be frustrated.

The decision below, however, determined that rights conferred by federal equal employment statutes may be asserted under Section 1985(3). The dangers presented by this interpretation are crystallized in the facts of this case where a violation of Title VII was alleged.

In Title VII, Congress created an administrative/judicial framework with the emphasis on informal conciliation of charges before litigation was necessitated. If the right to be free from sex discrimination in the private sector conferred by Title VII, and Title VII alone, may be enforced under Section 1985(3), the careful work of Congress will be negated.

The damage which the Third Circuit's interpretation will cause to Title VII is not mere speculation because enforcement of a Title VII right under Section 1985(3) is much more attractive. Under Section 1985(3) a plaintiff can avoid exhaustion of the administrative process, obtain a longer statute of limitations, request a jury trial, and sue for broader relief.

Based on these considerations, the Fourth Circuit has correctly rejected the interpretation of the Third Circuit and held that the Title VII enforcement mechanism is the exclusive remedy for rights conferred by that statute.

III. In *Griffin v. Breckenridge*, 403 U.S. at 104, this Court held that a "source of congressional power to reach the private conspiracy alleged by the complaint" must be identified in each case. In this case the Third Circuit identified the

commerce clause as the source of congressional power to reach the private conspiracy, which, in its view, is a conspiracy by a private employer to deprive the Association's female employees of equal employment opportunities.

The commerce clause, however, is not a source of power for 1985(3). Although Congress can impose "protective conditions" on the privilege of engaging in an activity which affects commerce, this Court has consistently required that the activities sought to be regulated have a substantial impact on interstate commerce, and, in addition, there must be evidence that Congress intended to protect interstate commerce through the imposition of such protective conditions. Neither requirement is satisfied when 1985(3) and its legislative history are examined.

Section 1985(3) stands in stark contrast to other statutes where Congress used the commerce clause as a source of power. The framers of 1985(3) set no parameters in it to determine whether a particular activity had a substantial effect on commerce. In addition the legislative history reveals no intent or need to protect interstate commerce through 1985(3).

Similarly, reliance by Novotny on the thirteenth and fourteenth amendments as the source of power to reach the private conspiracy is misplaced. The thirteenth amendment applies only to discrimination on the basis of race or color. It has nothing to do with discrimination on the basis of sex. The fourteenth amendment applies only where there has been at least some form of state involvement, which is absent here.

It is therefore clear that there is no source of congressional power to reach the private conspiracy alleged in this case.

ARGUMENT

In *Griffin v. Breckenridge*, 403 U.S. 88, 102-103 (1971), this Court listed the elements of a cause of action under 42 U.S.C. § 1985(3). These elements are:

> (1) a conspiracy
>
> (2) for the purposes of depriving a person or class of persons of the equal protection of the laws or equal privileges and immunities under the law (that is, a conspiracy motivated by class-based discriminatory animus); and
>
> (3) an overt act in furtherance of the conspiracy
>
> (4) by which one is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States.

A court, in addition, must identify "a source of congressional power to reach the private conspiracy alleged by the complaint." *Id.* at 104.

The instant Complaint, however, failed to allege the existence of a legally cognizable conspiracy; failed to allege a violation of a right cognizable under the statute, and failed to allege a violation of a right assertible against a private conspiracy under Section 1985(3). For these reasons the cause of action under Section 1985(3) should have been dismissed.

I. The Instant Complaint Fails To Plead The Existence Of A Legally Cognizable Conspiracy.

The language of 42 U.S.C. § 1985(3) mandates that "two or more persons" must "conspire" to deprive an individual of the equal protection of the laws or of equal privileges and immunities under the laws in order to establish a cause of action under that statute.

This requirement that "two or more persons" must conspire is redundant because "[i]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy." *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).[2]

The instant Complaint attempts to allege a conspiracy among the officers and directors of the Association to deprive Novotny of his rights under the Constitution of the United States, particularly his rights to free speech and association (App. A at 5, ¶ 26). But the Complaint further alleges that "[a]t all times relevant hereto, the individual defendants were and are acting on behalf of GAF [the Association]" (App. A at 7, ¶ 33).

Even with the truth of the conspiracy allegations assumed, therefore, the Complaint fails to plead the existence of the civil conspiracy required by Section 1985(3).

A. Officers And Directors Acting On Behalf Of A Corporation Cannot Form A Civil Conspiracy.

Although a corporation is a "person" for purposes of 42 U.S.C. § 1985(3), it is a person with very special characteristics. As Chief Justice Marshall noted:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most im-

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[2] The Court of Appeals for the Third Circuit acknowledged this fundamental requirement in the decision below when it stated that a conspiracy "requires a plurality of legal personalities as one of its elements" (Pet. App. A at 51a).

> portant are immortality, and, if the expression may be allowed, individuality; properties *by which a perpetual succession of many persons are considered as the same, and may act as a single individual.* They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) (emphasis added).

A corporation is an artificial person which can only act through its officers, directors, and other agents.[3] Any corporate decision therefore involves a multiplicity of officers, directors or agents acting as one person.

When corporate decisions intentionally or unintentionally ran afoul of the law, courts, faced with the choice of going behind the corporate personality to reach the actual individuals involved or holding the corporate entity liable for the unlawful acts, held the corporate entity liable.[4]

[3] *Dorsey v. Chesapeake and Ohio Railway Co.*, 476 F.2d 243 (4th Cir. 1973) (*per curiam*); *Pearson v. Youngstown Sheet and Tube Co.*, 332 F.2d 439, 442 (7th Cir.), *cert. denied*, 379 U.S. 914 (1964). In the decision below the Third Circuit attempts to draw a semantic distinction between conspiracies where the corporation is alleged to be a participant along with its officers and directors and conspiracies where only the officers and directors are allegedly participants (Pet. App. A at 52a). Since a corporation can act only through its officers, directors, and other agents, the attempted distinction is meaningless. The instant Complaint clearly alleged that, at all relevant times, the officers and directors were working on behalf of the Association (App. A at 7, ¶33).

The principle of vicarious liability known as *respondeat superior* made this choice reasonable and logical. Under that principle, responsibility for a harmful act by a corporate agent, no matter how lowly ranked, is automatically imputed to the corporation itself. The principle evolved from a need to provide victims with more effective means of redress.[5] Victims of corporate agents can proceed under this principle against a corporation, which is more likely to have assets to satisfy the harm than its agents.[6] The victim otherwise would be limited to the individuals responsible and complete redress might be impossible. 1 *Cooley on Torts* § 70 at 221 (4th ed. 1932).

[4] *See* W. Cary, *Corporations* at 109 (4th ed. 1969).

[5] The economic rationale behind this principle has been described as follows:

> What has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the basis of all past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.

W. L. Prosser, *Torts* § 69 at 459 (4th ed. 1971) (footnotes omitted).

[6] Courts, of course, can and do "pierce the corporate veil" to hold individuals liable in those relatively rare instances where a corporation has been formed with few, if any, assets for the purpose of shielding individuals from liability. *See* discussion *infra* at 22-24.

Civil conspiracies involving a corporation and its agents presented a similar choice of recognizing collective corporate action as the action of one, or more than one, person.

The purpose of civil conspiracy liability is not to punish individuals for their agreement to achieve an unlawful end or a lawful end by unlawful means. Instead, its purpose is to compensate for the resulting injury. For this reason, the focus of the civil conspiracy rationale is not on the *agreement* to conspire, but on compensating for the unlawful and/or harmful *results* of the overt acts in furtherance of the conspiracy.

In the normal situation not involving a corporation, a person who has suffered harm from an overt act in furtherance of a civil conspiracy can seek compensation under a civil conspiracy cause of action from individuals who *indirectly* or *directly* participated in the overt act. W. L. Prosser, *Torts* § 46 at 293 (4th ed. 1971). In this manner the victim is afforded the best opportunity to recover fully for the harm suffered.

Where a corporation and its agents have caused a harmful act, however, a different rule has been applied: a corporation cannot conspire with itself or its agents. *Nelson Radio, supra,* 200 F.2d at 914. This rule recognizes that a corporation can act *only* through its agents and not in and of itself. Collective action by its agents acting on its behalf is therefore not a conspiracy, since only one "person" is acting.

The civil conspiracy rule that a corporation cannot conspire with itself is therefore a logical extension of the general corporate law principle that a corporation can act only through its agents. If a corporation can only act through its agents, it is incapable of acting and conspiring independently of them. Due to a corporation's vicarious liability for its agents' acts, the civil conspiracy's purpose of providing the most effective relief for victims is also effectuated, albeit in a

different manner. No reason consequently exists to fictionalize corporate decisions, many if not all of which are necessarily collective, as civil conspiracies involving more than one person.

In contrast, a rule that a corporation can conspire with its agents ignores reality, contradicts and undercuts the "alter ego" corporate law principle and opens federal courts to civil conspiracy litigation needlessly duplicative of causes of action which already provide adequate means of relief.

To provide this greater source of compensation and avoid the multitude of problems created by a contrary rule, courts have consistently held that the activities of officers, directors and other agents on behalf of their corporation cannot give rise to a civil conspiracy.

In *Dorsey v. Chesapeake and Ohio Railway Co.*, 476 F.2d 243 (4th Cir. 1973) (*per curiam*), for example, agents of the defendant corporation allegedly conspired to wrongfully discharge the plaintiff and deny him due process. The Fourth Circuit, however, affirmed the dismissal of the conspiracy allegation as follows:

> Since a corporation can act only through its agents, the effect of Dorsey's charge of conspiracy between the defendant Railway Company and its agents was to charge a conspiracy by a single party.

476 F.2d at 245-46.[7]

[7] *Accord: Worely v. Columbia Gas*, 491 F.2d 256 (6th Cir. 1973), *cert. denied*, 417 U.S. 970 (1974) (conspiracy to maliciously prosecute); *Pearson v. Youngstown Sheet and Tube Co.*, 332 F.2d 439 (7th Cir.), *cert. denied*, 379 U.S. 914 (1964) (conspiracy to interfere with employment contract); *Zelinger v. Uvalde Rock Asphalt Co.*, 316 F.2d 47 (10th Cir. 1963) (conspiracy to interfere with distributorship contract); *Friendship Medical Center, Ltd. v. Space Rentals*, 62 F.R.D. 106 (N.D. Ill. 1974) (conspiracy to defraud); *Koehring Co. v. National Automatic Tool Co.*, 257 F. Supp. 282 (S.D. Ind. 1966), *aff'd*, 385 F.2d 414 (7th Cir. 1967) (conspiracy to appropriate trade secrets).

Similarly, courts have consistently recognized that agents of a corporation cannot form a civil conspiracy punishable by statute. *E.g., Nelson Radio, supra* (conspiracy to violate anti-trust laws); *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) (conspiracy to violate Section 1985(3)).[8]

Individual officers, directors and agents working on behalf of their corporation, therefore, cannot engage in a civil conspiracy at common law or by statute.

B. Criminal Conspiracy Principles Are Not Applicable Under Section 1985(3).

In the decision below the Court of Appeals for the Third Circuit found that the officers and directors of a corporation could form a conspiracy. The reasoning behind this conclusion, however, was based solely on cases finding individual officers and directors guilty under a *criminal* conspiracy theory.[9]

Unlike civil conspiracy, which attempts to *compensate* the victim for his injury, criminal conspiracy seeks to *punish the individuals* who have agreed to take an unlawful course of conduct. The gravamen of the offense of criminal conspiracy

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[8] The application of this principle to cases arising under Section 1985(3) will be discussed in much more detail *infra* at 21-24.

This principle, of course, only applies as long as the officers, directors, or agents are acting on the corporation's behalf. *Johnston v. Baker*, 445 F.2d 424 (3d Cir. 1971). Acts which are personally motivated cannot be imputed to the corporation (W. L. Prosser, *Torts* § 70 at 461 (4th ed. 1971)), and the victim of the unlawful act must seek his remedy from the individual actor and any person conspiring with him.

[9] The Third Circuit relied exclusively on cases decided under the federal criminal conspiracy statutes, primarily 18 U.S.C. §§ 241, 242, and 371. *E.g., Pennsylvania R. R. System & Allied Lines, Fed. No. 90 v. Pennsylvania R. R. Co.*, 267 U.S. 203 (1925); *Mininsohn v. United States*, 101 F.2d 477 (3d Cir. 1939).

is the *agreement* itself. *Wilkins v. United States*, 376 F.2d 552 (5th Cir. 1967), *cert. denied*, 389 U.S. 964 (1967); *United States v. Fruit*, 507 F.2d 194 (6th Cir. 1974). Since no act resulting in harm to an individual is required to commit this offense, criminal conspiracy is often labelled a "mental" crime.[10]

As a result, one element of the offense of criminal conspiracy is specific intent. *United States v. Guest*, 383 U.S. 745 (1966). In terms of 18 U.S.C. § 241, the criminal analogue of Section 1985(3), this means specific intent to interfere with the federal rights in question. *Anderson v. United States*, 417 U.S. 211 (1974).[11]

Liability under a criminal conspiracy theory, therefore, is imposed on a strictly individualized basis. Each participant must have the requisite intent to commit the offense, and an individual is never presumed liable because of a position which he or she occupies. At the same time an individual is not permitted to avoid criminal liability for such intent because of a position which he or she occupies. *See Pennsylvania R. R. System, supra.*

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[10] *See* P. Marcus, *Criminal Conspiracy: The State Of Mind Crime-Intent, Proving Intent, and Anti-Federal Intent*, 1976 U. of Ill. L.F. 627 (1976); I. Dennis, *The Rationale of Criminal Conspiracy*, 93 Law Q. Rev. 39 (1977).

[11] 18 U.S.C. § 241 provides as follows:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

This specific intent analysis, however, is not applied when a civil conspiracy is charged. In the case of Section 1985(3), this Court has held that:

> The motivation requirement introduced by the word "equal" into the portion of § 1985(3) before us must not be confused with the test of "specific intent to deprive a person of a federal right made definite by decision or other rule of law" articulated by the plurality opinion in *Screws v. United States*, 325 U. S. 91, 103, for prosecutions under 18 U.S.C. § 242. Section 1985(3), unlike § 242, contains no specific requirement of "wilfulness." Cf. *Monroe v. Pape*, 365 U.S. 167, 187. The motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus.

Griffin v. Breckenridge, 403 U.S. 88, 102 n.10 (1971).

There is no requirement of specific intent because a Section 1985(3) conspiracy is a civil conspiracy intended to remedy the harm suffered by an individual because that individual is a member of a definable group.[12] Accordingly, under Section

[12] In *Griffin, supra*, this Court reserved the question of whether Section 1985(3) encompasses any class-based animus other than racial bias. 403 U.S. at 102 n.9. The Third Circuit held that sex is a class for purposes of Section 1985(3) because sex is a "suspect classification" in light of this Court's decision in *Frontiero v. Richardson*, 411 U.S. 677 (1973). (Pet. App. A at 17a). *But see Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Weisenfield*, 420 U.S. 636 (1975); *Schlesinger v. Ballard*, 419 U.S. 498 (1975). No other circuit has ruled on application of Section 1985(3) to sex-based classes.

The Third Circuit also expanded the concept of standing under Section 1985(3) to include those who merely advocate the rights of members of the class subjected to the discrimination (Pet. App. A at 20a). *See also Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971). *But see Hahn v. Sargent*, 523 F.2d 461, 469 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976); *Arnold v. Tiffany*, 487 F.2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *DesVergnes v. Seekonk Water District*, 448 F. Supp. 1256 (D. Mass. 1978).

1985(3), there is no automatic need to pierce the corporate veil to punish the individual agents responsible for the harm, and no satisfactory manner of determining each agent's invidiously discriminatory animus and resultant responsibility.[13] Holding only the corporation liable is, therefore, necessary and sufficient.

In addition, application of a criminal conspiracy theory in this case would not meet other purposes behind the development of that theory either. The basic evils which criminalization of conspiracy is designed to prevent were summarized by Justice Frankfurter in *Callanan v. United States*, 364 U.S. 587, 593-594 (1961), as follows:

> [C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

[13] One of the primary dangers in applying criminal conspiracy principles under Section 1985(3) is that an individual may be liable because he or she occupies a position which might have had some input into the "harmful" decision. In this case, for example, liability could be imputed to an officer or director because he voted to terminate Novotny. Since his motivation will never be examined under Section 1985(3), however, we will never know whether he voted to further an unlawful purpose.

The distinction between this case and a criminal conspiracy case is that, individually, the corporate officers and directors could not violate Title VII. Only the corporation, the "employer," could succeed in depriving the class of its Title VII rights, since it is only the corporation's conduct and employment practices which are regulated by Title VII. 42 U.S.C. § 2000e-2(a). The fact that a number of officers are involved in a corporate decision to violate Title VII does *not* increase the potential harm to the public. The likelihood that the corporation will "succeed" in violating Title VII is not increased by the number of individual officers and directors involved in the decision. The "group association" by the corporate officers and directors would not increase the complexity of the Title VII violation. The combined decision of the corporate officers and directors does not make it more likely that the corporation will violate laws other than Title VII. In other words, *none* of the increased evils cited by Justice Frankfurter as justification for the existence of the criminal conspiracy offense are present where officers and directors of the same corporation combine in a decision for that corporation to violate Title VII.[14]

[14] It should also be noted that the Third Circuit interpreted Novotny's allegations to reach the conclusion that a conspiracy to violate Title VII rights existed. The charge which Novotny filed with the EEOC, however, alleged that *only* the Association violated Title VII (Novotny's EEOC charge appears in the record as Exhibit A to the Reply Memorandum in support of the Association's Motion to Dismiss). Novotny had the opportunity to allege such a violation by his employer "and any agents." 42 U.S.C. § 2000e(b). He chose not to name the officers and directors as Respondents to the charge, and a federal court would not have jurisdiction over those individual officers and directors in a Title VII action. *Le Beau v. Libby-Owens Ford Co.*, 484 F.2d 798 (7th Cir. 1973); *Mickel v. South Carolina State Employment Service*, 377 F.2d 239 (4th Cir. 1967), *cert. denied*, 389 U.S. 877 (1967). Consequently, the individual officers and directors here can only be charged with a violation of Title VII under the skewed interpretation of Section 1985(3) by the Third Circuit.

A violation of Section 1985(3), therefore, should not be founded on principles of criminal conspiracy. Specific intent is not required under Section 1985(3). Consequently, "piercing the corporate veil" is unjustified and unnecessary. The Court of Appeals for the Third Circuit, therefore, erred in its reliance on criminal conspiracy principles.

C. Officers And Directors Working On Behalf Of The Corporation Cannot Form A Conspiracy Under 42 U.S.C. § 1985(3).

When distinctions between civil and criminal conspiracies are analyzed, it is understandable that every other circuit court to consider the issue has ruled that officers and directors of a corporation cannot form a conspiracy for purposes of Section 1985(3).

In *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972), the plaintiff had alleged a conspiracy by a corporation and one of its officers to deprive plaintiff of his first amendment right to free association by refusing to rent him office space because his clients were black and Spanish-speaking. The district court, on summary judgment, ruled in plaintiff's favor on the Section 1985(3) count.

Speaking for the circuit court, Judge (now Mr. Justice) Stevens reversed the judgment for the following reason:

> We also believe that the statutory requirement that "two or more persons . . . conspire or go in disguise on the highway," is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm. We do not suggest that an agent's action within the scope of his authority will always avoid a conspiracy finding. Agents of the Klan certainly could not carry out acts of violence with impunity simply because they were acting under orders from the Grand Dragon. But if the challenged conduct is essentially a single act of dis-

> crimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute. Cf. *Morrison v. California*, 291 U.S. 82, 92, 54 S. Ct. 281, 78 L.Ed. 664. In this case we believe the evidence fails to establish this element of a § 1985(3) violation.

459 F.2d at 196. *Accord: Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66, 70-72 2d Cir. 1976), *cert. denied*, 425 U.S. 974 (1976); *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir. 1978), *cert. denied*, 47 U.S.L.W. 3391 (Dec. 5, 1978); *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504, 508 (4th Cir. 1974); *Fallis v. Dunbar*, 532 F.2d 1061 (6th Cir. 1976) (*per curiam*); *Baker v. Stuart Broadcasting Co.*, 505 F.2d 181, 183 (8th Cir. 1974). *See also McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 940 (5th Cir. 1977) (*en banc*) (dissenting opinion).

In the decision below, however, the Third Circuit specifically declined to "follow the line of cases adopting the rule that concerted action among corporate officers and directors cannot constitute a conspiracy under § 1985(3)" (Pet. App. A. at 55a).

The reasoning behind the Third Circuit's decision is difficult to grasp.[15] The court did express some fear that the corporate form should not be used to shield "the agreement of three partners to use their business to harass any blacks who register to vote" (Pet. App. A at 51a). These fears, however, are groundless.

In *Dombrowski*, the court noted that the corporate form will not always shield the agent's activities. 459 F.2d at 196.

[15] The fact that the Third Circuit had to justify its decision by applying criminal conspiracy principles to the civil conspiracy alleged in the Complaint has already been discussed.

In *Cole v. University of Hartford*, 391 F. Supp. 888 (D. Conn. 1975), Judge Blumenfeld elaborated on this point as follows:

> Perhaps the best explanation for this dicta in *Dombrowski* is that the law will not let those who would otherwise fall afoul of § 1985(3) avoid its effects by forming a corporation. In other words, conspirators may not create a principal for whom they are agents in order to make their acts all the acts of a single legal person that cannot be charged with conspiring with itself. This "piercing the veil" notion is more satisfying than a distinction based on the presence of violent acts, for it comports with well-recognized principles from other areas of the law. *See, e.g.*, Anderson v. Abbot, 321 U.S. 349, 361-363, 64 S.Ct. 531, 88 L.Ed. 793 (1944); Minton v. Cavaney, 56 Cal. 2d 576, 15 Cal.Rpter. 641, 364 P.2d 473 (1961)(en banc) (Traynor, J); W. Cary, Cases and Materials on Corporations 109-49 (4th ed. unabr. 1969). Neither this reading nor the "violence" reading gives succor to the plaintiff in this case, however. The University of Hartford was obviously not incorporated in order to prepetuate racial discrimination; the complaint alleges no violence done to the plaintiff.

391 F. Supp. at 893 (footnotes omitted).[16]

[16] State courts have often noted that a corporation cannot be formed for unlawful purposes:

> In contemplation of law, a corporation is a legal entity, an ideal person, separate from the real persons who compose it. This fiction, however, is limited to the uses and purposes for which it was adopted—convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members. A corporation cannot be formed for the purpose of accomplishing a fraud or other illegal act under the disguise of the fiction; and, when this is made to appear, the fiction will be disregarded by the courts, and the acts of the real parties dealt with as though no such corporation had been formed, on the ground that fraud vitiates everything into which it enters, including the most solemn acts of men.

First Nat. Bank v. Trebein Co., 59 Ohio 316, 52 N.E. 834 (1898).

Thus, the corporate veil can always be pierced to prevent injustices resulting from the incorporation of individuals with avowedly discriminatory purposes such as the Ku Klux Klan.

The fact remains, however, that the Association was undisputedly not formed to foster sex discrimination. It is unnecessary to pierce the corporate veil in this instance.[17] Furthermore, there is no dispute that the officers and directors were working on behalf of the corporation. The Complaint alleged as much (App. A at 7, ¶33).

Under these circumstances, therefore, the Complaint failed to allege the existence of a conspiracy for purposes of Section 1985(3) as a matter of law.

II. A Violation Of Title VII Cannot Constitute A Deprivation Of Equal Protection Or Equal Privileges And Immunities Under The Laws For Purposes Of 42 U.S.C. § 1985(3).

Section 1985(3) provides a remedy for deprivations of "the equal protection of the laws and equal privileges and immunities under the laws." In *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), this Court determined that the word "equal" requires that the deprivation of right be motivated by "class-based, invidiously discriminatory animus."

The parameters of the "rights" protected by Section 1985(3), however, were not delineated by the *Griffin* Court.[18]

[17] The Association obviously does not contend that its corporate form shields it from liability for sex discrimination which might have occurred as a result of its employment practices and policies. The remedy for such discrimination, however, lies under Title VII, not 42 U.S.C. § 1985(3).

[18] The complaint in *Griffin* alleged violations of fundamental rights of citizenship flowing from the Constitution and the Bill of Rights— "rights such as free speech, assembly, association, and movement." 403 U.S. at 103. The Court discussed the case in terms of violations of rights flowing from the thirteenth amendment and the right to interstate travel.

As a result, courts have had widely disparate interpretations regarding the scope of the rights which may be asserted in a Section 1985(3) cause of action.

In the decision below the Third Circuit interpreted the statute to encompass rights conferred by federal law,[19] and, in this particular case, the "deprivation of a right secured by a federal statute guaranteeing equal employment opportunity" (Pet. App. A at 28a).[20]

This broad interpretation of Section 1985(3), however, far exceeds its legislative purpose and undermines the administrative framework of federal equal employment statutes and, by extension, other laws.

A. Section 1985(3) Was Intended To Protect Fundamental Rights Of Citizenship For Which No Federal Jurisdiction Was Available.

The present text of 42 U.S.C. § 1985(3) originated in Section 2 of the Enforcement Act of 1871 (Act of April 20, 1871, ch. 22, 17 Stat. 13), more popularly known as the "Ku Klux Klan

[19] The Third Circuit did qualify its interpretation by stating that it did not have to consider whether the rights conferred by *all* federal statutes may be enforced under Section 1985(3) (Pet. App. at 28a), but it is difficult to determine where the circuit court would draw the line. Carried to its logical conclusion, under the Third Circuit's opinion rights conferred by *all* federal statutes would be actionable.

[20] The Complaint specifically alleged that the conspiracy deprived Novotny of "his constitutional rights to freedom of expression and association" (App. A at 5-6, ¶26). These rights, however, can only be deprived by the federal government in contravention of the first amendment and the states in contravention of the fourteenth amendment. The Third Circuit refused to consider whether a deprivation of such rights could be remedied under Section 1985(3) because the allegations regarding the Title VII violation were found sufficient to plead a cause of action under Section 1985(3) (Pet. App. A at 31a, n. 61). Section 1985(3) cannot remedy the deprivation of first or fourteenth amendment rights, however, without an allegation of state action. See discussion *infra* at 48-51.

Act." As this Court recognized in *Monroe v. Pape*, 365 U.S. 167 (1961):

> This Act of April 20, 1871, sometimes called 'the third force bill,' was passed by a Congress that had the Klan 'particularly in mind.' The debates are replete with references to the lawless conditions existing in the South in 1871. There was available to the Congress during these debates a report, nearly 600 pages in length, dealing with the activities of the Klan and the inability of the state governments to cope with it. This report was drawn on by many of the speakers.

365 U.S. at 174 (footnotes omitted).

As a result of lawlessness and the inability or refusal of the Southern states to cope with it, Congress created a civil remedy in Section 1 of the 1871 Act which is now codified as 42 U.S.C. § 1983, against those "who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." 365 U.S. at 176 (emphasis the Court's).

In Section 2 of the Act, however, Congress provided a penal remedy against individual Klan members who violated a person's constitutional rights by activity considered a federal crime. Consequently, the text of Section 2 as reported on the floor of the House was as follows:

> "That if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge

> of official duty, arson, or larceny, and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony, and upon conviction thereof shall be liable to a penalty of not exceeding $10,000 or to imprisonment not exceeding ten years, or both, at the discretion of the court."

Cong. Globe, 42d Cong., 1st Sess., 366.[21]

Many representatives, however, doubted the constitutionality of a provision which elevated state misdemeanors such as assault and battery to the level of federal felonies. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess., 455 (Representative Cox: "The fourteenth amendment does not in a single particular enlarge the jurisdiction of the United States over crimes in the States").

Many others were concerned that the Act would make every state crime a federal offense. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess., 382-383.

As a result a substitute amendment was adopted which provided, in part, as follows:

> SEC. 2. That if two or more persons within any State or Territory of the United States shall conspire . . .
>
> * * *

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[21] Other sections of the 1871 Act empowered the President to call out the militia or land and naval forces of the United States and to suspend the writ of *habeas corpus* when the conspirators in a state became so powerful that they could obstruct or hinder the execution of the laws. These provisions are typical of the type of legislation which the Reconstruction Congress enacted to attempt to correct the social disorder in the South.

> together for the purpose either directly or indirectly of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within each State the equal protection of the law, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States, or district or supreme court of any Territory of the United States having jurisdiction of similar offenses, shall be punished by a fine not less than $500 nor more than $5,000, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine; and if any one or more persons engaged in such conspiracy, such as is defined in the preceding section, shall do or cause to be done any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy.

Cong. Globe, 42d Cong., 1st Sess., 477.[22]

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[22] The criminal portion of this section was later codified as R. S. § 5519, which was declared unconstitutional, as will be discussed *infra*, in *United States v. Harris*, 106 U.S. 629 (1883), and was later repealed. The civil remedy was codified as R.S. 1980 which later became 42 U.S.C. § 1985.

The specification of crimes was therefore deleted and a civil remedy added by the substitute amendment. Deletion of the list of state laws from the substitute amendment reveals that the amendment's scope was more narrow than that of the original bill.

This legislative history also makes clear that the purpose of the statute was to provide a federal forum for the vindication of violations of the fundamental rights of citizens, those rights which had so recently been extended to blacks by the thirteenth, fourteenth, and fifteenth amendments. *District of Columbia v. Carter*, 409 U.S. 418 (1973).[23]

Consistent with this legislative history, Mr. Justice Burton, speaking on behalf of the dissenters in *Collins v. Hardyman*, 341 U.S. 651 (1951), recognized:

> Congress certainly has the power to create a federal cause of action in favor of persons injured by private individuals through the abridgment of federally created constitutional rights. It seems to me that Congress has done just this in R. S. § 1980(3) [now 42 U.S.C. 1985(3)].

341 U.S. at 664, as quoted with approval in *Griffin v. Breckenridge*, 403 U.S. 88, 95 (1971).[24]

In *Griffin*, the Court described this element of the cause of action under Section 1985(3) as the assertion that the plaintiff was "deprived of having and exercising any right or privilege of a citizen of the United States." 408 U.S. at 103.

In discussing the parameters of 18 U.S.C. § 241, Section 1985(3)'s closest criminal analogue, Justice Fortas declared:

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[23] It is, therefore, unsurprising that the Enforcement Act of 1871 was entitled "An Act To Enforce The Provisions Of The Fourteenth Amendment To The Constitution Of The United States, And For Other Purposes." 17 Stat. 13.

[24] In *Collins* the right to petition the federal government was in issue.

> In this context, it is hardly conceivable that Congress extended § 241 to apply only to a narrow and relatively unimportant category of rights. We cannot doubt that the purpose and effect of § 241 was to reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth, and Fifteenth Amendments, and not merely under part of it.

United States v. Price, 383 U.S. 787, 805 (1966).

Unfortunately, many courts have interpreted the phrase "under the laws" much more broadly and literally than the *Price* Court. The Court of Appeals for the Fifth Circuit, for example, has developed an "independent illegality" theory. *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (*en banc*). Under this theory a cause of action under Section 1985(3) requires a violation of a right secured by *any* federal or state statute.[25]

Application of the independent illegality theory, however, leads to extremely anomalous results, as demonstrated by *Britt v. Suckle*, 453 F. Supp. 987 (E.D.Tex. 1978), where the court, applying the *McLellan* standards under Section 1985(3), found federal jurisdiction under Section 1985(2) for an alleged violation of rights conferred by the Texas Workmen's Compensation Act. Under this theory, therefore, the federal courts can and will be overburdened with actions which should be asserted only in state court.[26]

Furthermore, the independent illegality theory removes protection from those rights which need it the most. As Judge

[25] In *McLellan* the plaintiff asserted a violation of his rights under the Bankruptcy Act. The court dismissed the suit, however, because the plaintiff had no demonstrable rights under that Act.

[26] Under 18 U.S.C. § 241, this Court has already determined that no rights conferred by state law fall within the scope of the "under the laws" provision in that statute. *United States v. Waddell*, 112 U.S. 76 (1884).

Godbold noted in his dissent from the *McLellan* majority decision:

> I would have thought that the strongest, not the weakest, case for application of § 1985(3) is presented when no other law protects the exercise of an important right.

545 F.2d at 938. *See also* Note, *Private Conspiracies to Violate Civil Rights*, 90 Harv. L. Rev. 1721 (1977).

The independent illegality approach is, therefore, an unsound method for determining the rights enforceable under Section 1985(3).

In the decision below, the Court of Appeals for the Third Circuit took another approach. The Court declared that:

> Whatever else 'equal privileges and immunities' or 'equal protection' may mean in the context here, we conclude that a deprivation of equal privileges and immunities under § 1985(3) includes the deprivation of a right secured by a federal statute guaranteeing equal employment opportunity [Pet. App. A at 28a].

The interpretation of the Third Circuit therefore would allow rights conferred explicitly by other federal statutes to be asserted under Section 1985(3). That court, however, completely ignored the crucial question of whether the federal statute granting the right provides for federal jurisdiction in its own terms.

In *Hodgin v. Jefferson*, 447 F.Supp. 804 (D. Md. 1978), for example, the court applied an interpretation of Section 1985(3) similar to the one espoused by the Third Circuit and held that an alleged violation of rights created by the Federal Equal Pay Act, 29 U.S.C. § 206d (1976), supports a cause of action under Section 1985(3).

The *Hodgin* court ignored the fact that Congress created jurisdiction in the federal courts to remedy violations of the Equal Pay Act under 29 U.S.C. § 216. Moreover, federal jurisdiction over a suit by an individual employee is *conditional* on the following:

> The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under Section 217. . . .

In light of the decision below, however, an employee could bring suit under Section 1985(3) to vindicate rights under the Equal Pay Act, and this action would not be blocked by the proviso in Section 216. Under these circumstances, the intent of Congress in enacting Section 216 would clearly be contravened.[27] *See also Murphy v. Operating Engineers, Local 18,* .... F.Supp. ...., 99 LRRM 2074, (N.D. Ohio 1978) (violation of rights under Labor-Management Reporting and Disclosure Act enforceable under Section 1985(3)).

The legislative history of Section 1985(3) indicates that the statute was intended to provide a federal forum for the vindication of rights which otherwise had to be protected by the ineffective state courts in the Reconstruction South. If a federal statute provides its own jurisdictional basis for enforcing the right granted by that statute, Section 1985(3) is not needed and should not be applied to create duplicate, and sometimes conflicting, jurisdiction.

[27] It should also be noted that under the Third Circuit's interpretation a corporate employer almost necessarily "conspires" to set wage policies and practices. In addition, a violation of the Equal Pay Act requires sex-based discrimination. Every violation of the Equal Pay Act, therefore, *automatically* becomes a violation of Section 1985(3).

Following this reasoning, the Court of Appeals for the Second Circuit held that an alleged violation of rights granted under the Labor-Management Relations Act, 29 U.S.C. § 158 (1976), cannot establish a cause of action under 18 U.S.C. § 241:

> Courts, in a variety of ways, have emphasized that enforcement of rights under the Labor Act is entrusted exclusively to the Labor Board as an expert administrative agency, whose orders are reviewed by the courts.

United States v. DeLaurentis, 491 F.2d 208, 213 (2d Cir. 1974). The administrative process therefore cannot be circumvented by asserting federal jurisdiction under 18 U.S.C. § 241. *See also Ferdnance v. Automobile Trans. Inc.,* .... F.Supp. ...., 97 LRRM 2473 (E.D. Mich. 1978) (violation of rights under National Labor Relations Act will not support cause of action under Section 1985(3)).

Similarly, in *Platt v. Burroughs Corp.,* 424 F. Supp. 1329 (E.D.Pa. 1976), the court refused to allow an alleged violation of the Age Discrimination in Employment Act to establish a cause of action under Section 1985(3) because Congress intended the procedures of that Act to be the "exclusive judicial remedy for age discrimination." *Id.* at 1340.[28]

The rights assertible under Section 1985(3), therefore, cannot include rights conferred by federal statutes which provide for their own jurisdictional basis. A decision to the contrary destroys the careful administrative framework which Congress created in statutes like the Equal Pay Act and the Age Discrimination in Employment Act and creates a general

[28] *Cf. United States v. Johnson,* 390 U.S. 563 (1968), where the Court held that the black plaintiffs could proceed against the defendants under 18 U.S.C. § 241 only because no relief was available to plaintiffs under the exclusive remedy provisions of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000b (1976).

federal tort law. Section 1985(3), therefore, applies only to fundamental constitutional rights for which there would otherwise be no federal jurisdictional base.

B. The Administrative/Judicial Framework Established By Congress Under Title VII Is The Exclusive Remedy For Violations Of Rights Conferred By Title VII.

The potentially disastrous effects of the decision below are crystallized in the Third Circuit's decision to allow the right to be free from sex discrimination in private employment granted by Title VII to be enforced under Section 1985(3).

The cornerstone of the Title VII enforcement scheme is conciliation of charges *before* the involvement of a federal court is necessitated. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), Mr. Justice Powell, speaking for a unanimous court, noted:

> Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 800 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971). *Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.* To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, *would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.*

Id. at 44 (emphasis added).

To achieve this goal of conciliation without litigation, Congress established a specific administrative framework

which must be exhausted before an aggrieved party could file a suit in federal court. A charge must be filed with the Equal Employment Opportunity Commission (or a state or local fair employment practice agency). The charge must be investigated, and the Commission must attempt to resolve the dispute through conciliation. Only when conciliation fails may a suit be filed by the Commission or the charging party. *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 359-360 (1977).

Based on these considerations the Court of Appeals for the Fourth Circuit held that the procedures under Title VII are "the exclusive mechanism for effectuating rights created by the statute." *Doski v. M. Goldseker Co.*, 539 F.2d 1326, 1334 (4th Cir. 1976). Since the plaintiff's right to be free from sex discrimination in private employment stemmed solely from Title VII, therefore, a violation of this right could not be asserted under Section 1985(3).

The Fourth Circuit correctly recognized that enforcement of Title VII rights under Section 1985(3) would destroy the careful enforcement mechanism created by Congress under Title VII. These fears are not based on mere supposition because enforcing a Title VII right under Section 1985(3) is much more attractive to a plaintiff. Under 1985(3), a plaintiff can avoid administrative compliance and obtain a longer statute of limitations, [29] the right to a jury trial,[30] no limitation on back pay,[31] and punitive damages.[32]

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[29] The Third Circuit has recently held that the statute of limitations for alleged violations of the Civil Rights Act of 1866 and 1870 occurring in the Commonwealth of Pennsylvania is six years. *Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978). This limitation period should be compared to the much shorter period (180 days, or 300 days in a deferral state) established by Congress for the filing of a charge with the Equal Employment Opportunity Commission to enforce Title VII rights. 42 U.S.C. § 2000e-5(c). This Court has recently emphasized the importance of such a timely filing with the Commission. *Evans v. United Air Lines, Inc.*, 431 U.S. 553 (1977).

(Footnotes continued on following page)

Thus, the effect of allowing Title VII rights to be enforced under Section 1985(3) would be a needless flood of federal court employment discrimination cases which could have been resolved through the administrative and conciliatory processes of Title VII as Congress intended.

Despite these considerations, the Third Circuit held that Title VII rights can be enforced under Section 1985(3) because the "language seems to protect *all* such privileges and immunities" (Pet. App. A at 38a). The Third Circuit totally ignored the consequences flowing from the assertion of Title VII rights under Section 1985(3).

Instead, the Third Circuit focused on generalities of conflicts between federal statutes and declared that "implied repeals" only occur if the statutes are unreconciliable (Pet. App. A at 38a). The Third Circuit further observed that this Court has held that the enactment of Title VII did not preempt the assertion of other pre-existing rights. *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). Both of these arguments, however, overlook the rationale of the *Doski* opinion.

First, there has been no suggestion that Title VII impliedly repealed Section 1985(3). As discussed in the previous sec-

(Footnotes continued from preceding page)

[30] *See e.g., Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973); *Don v. Okmulgee Memorial Hospital*, 443 F.2d 234 (10th Cir. 1971). There is no right to a jury trial under Title VII. *Johnson v. Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969); *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975).

[31] Title VII contains a two-year statutory limitation on back pay. 42 U.S.C. § 2000e-5(g).

[32] Unlike Section 1985(3), punitive damages are not available under Title VII. *Compare Murphy v. Local Union No. 18*, ... F.Supp. ....., 99 LRRM 2074 (N.D. Ohio 1978) (Punitive damages awarded under Section 1985(3)) *with Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977) (punitive damages may not be awarded in Title VII suit).

tion, Section 1985(3) is necessary to provide federal jurisdiction to remedy violations of the fundamental rights of national citizenship.

Second, the *Doski* decision did not foreclose the plaintiff from asserting pre-existing rights. Unlike Section 1981, Section 1985(3) is a *remedial* statute.[33] It must look elsewhere to find a source for the right to be protected (Pet. App. A at 29a). Before passage of Title VII, there was no right to be free from sex discrimination in private employment. When Congress did create such a right it chose a careful administrative/judicial framework in which that right must be remedied. The *Doski* decision, therefore, did not deprive a plaintiff of a pre-existing right.[34]

The sole question here is whether a right created by Title VII and Title VII alone can be remedied under another statute. In *Brown v. General Services Administration*, 425 U.S. 820 (1976), this Court determined that Section 717 of Title VII provides the exclusive remedy for claims of discrimination in federal employment. The reasoning behind this conclusion was as follows:

(1) A review of the prior case law indicated that there was no effective pre-existing remedy for employment discrimination suffered by federal employees;

[33] *Cf. United States v. Guest*, 383 U.S. 745, 754-55 (1966) (18 U.S.C. § 241 "does not purport to give substantive, as opposed to remedial, implementation to any rights . . .").

[34] 42 U.S.C. § 1981, on the other hand, granted persons the same rights to make and enforce contracts, to sue, be parties, and give evidence as enjoyed by white citizens. Unlike Section 1985(3), therefore, Section 1981 created substantive rights which pre-dated Title VII. *Johnson v. Railway Express Agency, supra*, therefore, is not applicable here. *See also Runyon v. McCrary*, 427 U.S. 160 (1976); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1970) (substantive rights conferred by Section 1982 not preempted by passage of Civil Rights Act of 1964).

(2) Congress intended to create such a right and remedy with the enactment of Section 717; and

(3) The Congressional intent was "to create an exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination." *Id.* at 829.

As held by the *Brown* Court:

> The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief. His view fails, in our estimation, to accord due weight to the fact that unlike these other supposed remedies, § 717 does not contemplate merely judicial relief. Rather, it provides for a careful blend of administrative and judicial enforcement powers. Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible. The crucial administrative role that each agency together with the Civil Service Commission was given by Congress in the eradication of employment discrimination would be eliminated "by the simple expedient of putting a different label on [the] pleadings." *Preiser v. Rodriguez*, 411 U.S. 475, 489-490 (1973). It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.

Id. at 832-833.[35]

[35] This analysis was recently echoed in *International Brotherhood of Teamsters v. Daniel*, ... U.S. ...., 47 U.S.L.W. 4135, 4139 (January 16, 1979):

> The existence of this comprehensive legislation governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Acts to noncontributory, compulsory pen-

(Footnote continued on following page)

Every one of the considerations which mandated the Court's decision in *Brown* applies with equal force to this case:

(1) There was no right or remedy for female employees who suffered discrimination in private employment;

(2) Congress intended to create such a right and remedy by enacting Title VII; and

(3) The Congressional intent was to create an exclusive, preemptive administrative and judicial scheme of enforcement.

Novotny is arguing here, just like the Petitioner in *Brown*, that "artful pleading" under Section 1985(3) can circumvent the careful "exhaustion requirements and time limitations" of Title VII.

There is thus no support or reason for the Third Circuit's determination that Title VII rights can be enforced under Section 1985(3).[36] The broad interpretation of "equal

(Footnote continued from preceding page)

> sion plans. Congress believed that it was filling a regulatory void when it enacted ERISA, a belief which the SEC actively encouraged. Not only is the extension of the Securities Acts by the court below unsupported by the language and history of those Acts, but in light of ERISA it serves no general purpose. See *Califano v. Sanders*, 430 U.S. 99, 104-107 (1977). *Cf. Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 250 (1970). Whatever benefits employees might derive from the effect of the Securities Acts are now provided in more definite form through ERISA.

[36] The Third Circuit characterized the decision in *Marlowe v. Fischer Body*, 489 F.2d 1057 (6th Cir. 1973), as being apposite to the *Doski* decision. In *Marlowe*, however, the plaintiff never alleged a cause of action under Section 1985(3). While remanding the case, the Sixth Circuit noted that an amended complaint might allege such a cause of action. Since the plaintiff was alleging *racial* discrimination, there were a number of constitutional provisions on which he could rely. There is no discussion in the *Marlowe* opinion, however, regarding the conflict between Title VII and Section 1985(3) and no holding that Title VII rights are enforceable under Section 1985(3).

privileges and immunities under the laws" espoused by the Third Circuit wreaks havoc with numerous jurisdictional provisions carefully thought out and enacted by Congress. The decision of the Third Circuit therefore must be reversed.

III. There Is No Congressional Source Of Power To Reach The Conspiracy Alleged In The Complaint Under Section 1985(3).

In *Griffin*, this Court held that a "source of congressional power to reach the private conspiracy alleged by the complaint" must be identified in each case. 403 U.S. at 104.

In the Third Circuit's opinion, the private conspiracy alleged by the instant Complaint was designed to deprive the Association's female employees of equal employment opportunities.

The Third Circuit identified the source of the class right as Title VII, more particularly 42 U.S.C § 2000e-2(a). The appellate court then determined that Title VII was properly enacted pursuant to the commerce clause of the United States Constitution, and "[t]he same authority which warrants the provision of such rights in the first place equally empowers Congress to provide sanctions against conspiracies to interfere with the equal enjoyment of rights under Title VII" (Pet. App. A at 47a).

It does not automatically follow that the commerce clause provides a constitutional source of power for enactment of 1985(3), however, merely because it provides a source for Title VII. To the contrary the commerce clause was never intended to be a source of power under Section 1985(3) and cannot reasonably be interpreted to extend to the private conspiracy alleged in the instant Complaint.

Although one historically permissible form of federal commerce regulation has been the imposition of "protective conditions" on the privilege of engaging in an activity that affects commerce, [37] this Court has consistently required:

1) that the activity sought to be regulated have a substantial impact on interstate commerce;[38] and

2) evidence that Congress intended to protect interstate commerce through the imposition of such protective conditions.[39]

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[37] *See, e.g., Hoke v. United States*, 227 U.S. 308 (1913) (upholding a ban on the interstate transportation of women for immoral purposes); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (upholding a ban on interstate transportation of impure food); *Champion v. Ames*, 188 U.S. 321 (1903) (the so-called "Lottery Case" where this Court upheld the constitutionality of legislation banning the interstate transportation of lottery tickets).

[38] In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964), Justice Clark stated:

> In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which concerns more states than one' and has a real and substantial relation to the national interest.

See, also, United States v. Darby, 312 U.S. 100 (1941); *NLRB v. Fainblatt*, 306 U.S. 601 (1939); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Sullivan*, 332 U.S. 689 (1948); *McDermott v. Wisconsin*, 228 U.S. 115 (1913); *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[39] Professor Laurence Tribe has noted in his treatise *American Constitutional Law* (1978) at p. 243:

> The Supreme Court pays particularly close heed to statutory language and legislative history in judging the reach of laws enacted under the commerce clause. A law will not be held to affect all the activities Congress in theory can control unless statutory language or legislative history constitutes a *clear statement* that Congress intended to exercise its commerce power in full.
>
> Professor Tribe cites a portion of a law review article written by Professor Begen which states:
>
> > . . . where the relationship of the law to interstate commerce is not readily apparent, the Court should require Congress to relate the law to its impact on interstate transactions. This could assist in focusing Congressional concern on the proper issues."

Begen, *The Hunting of the Shark: An Inquiry Into the Limits of Congressional Power Under the Commerce Clause*, 8 Wake Forest L. Rev. 187, 198 (1972).

Inquiry into Section 1985(3) reveals satisfaction of neither requirement.

The framers of § 1985(3) did not incorporate parameters into the statute which could establish whether a given activity regulated had a substantial impact on interstate commerce; nor does the statute's legislative history reveal that Congress intended or needed to protect interstate commerce through it.

In contrast the source of congressional power *expressly* relied on in enacting the Civil Rights Act of 1964 is the commerce clause. Although Title VII's constitutionality has never been challenged in this Court, its sister statute, Title II, was challenged.[40] In those cases this Court examined at length whether the activities which the comprehensive framework of Title II sought to regulate had a substantial impact on interstate commerce. In finding Title II constitutional, this Court found that racial discrimination in housing had a sufficient impact on commerce to justify the statute's partial reliance on the commerce clause as its source of congressional power.

In deciding the constitutionality of Title II, this Court noted that the framers of Title II had carefully incorporated into that statute's framework elements of proof that the regulated activity must "affect commerce." Section 201(b) of Title II, for instance, lists four classes of business establishments. Each "serves the public" and "is a place of public accommodation" within the meaning of Section 201(a), but "only if its operations affect commerce, or if discrimination or segregation by it is supported by state action." Title VII contains similar elements of proof. A condition precedent for a cause of action under Title VII is that the employer against whom the suit is brought must employ more than 25 employees and must engage in activity in interstate commerce.

[40] *Heart of Atlanta Motel, supra; Katzenbach v. McClung*, 379 U.S. 294 (1964); *Daniel v. Paul*, 395 U.S. 298 (1969).

The framers of § 1985(3) never contemplated that § 1985(3) might provide for a private cause of action to vindicate rights against discrimination in employment. Rather, as discussed *supra* at 29, the intent underlying § 1985(3) was to provide a federal forum for the vindication of violations of the fundamental rights of citizens, those rights so recently extended to blacks by the thirteenth, fourteenth and fifteenth amendments. Section 1985(3)'s framework thus should not be interpreted to incorporate elements of proof that activities to which its remedy extends must in any way "affect commerce."

As this Court noted in *Heart of Atlanta Motel, supra* at 257, "overwhelming evidence of the disruptive effect that racial discrimination had on commercial intercourse" justified Congress' legislation against moral wrongs in Title II. Absent proof of such effect, however, Congress could not legislate against these moral wrongs.

Such proof is absent in the legislative history and the framework of § 1985(3). Application of 1985(3) to a private conspiracy to deny women their rights under Title VII pursuant to the commerce clause is therefore unjustifiable.

Since Title VII and its constitutional source of power, the commerce clause, cannot be used to reach the private conspiracy alleged here, another source of power for the class right must be identified. Novotny has previously suggested two such sources, the thirteenth and fourteenth amendments.

A. The Thirteenth Amendment Does Not Provide A Source Of Power To Remedy Discrimination On The Basis Of Sex.

The thirteenth amendment prohibits slavery and involuntary servitude within the United States. The amendment has a *substantive* nature in that it is a self-executing abolition and prohibition of the condition of slavery. Pursuant to Section 2 of the amendment, however, Congress may pass

remedial legislation to "abolish all badges and incidents of slavery in the United States." *Civil Rights Cases*, 109 U.S. 3, 20 (1883); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).

In *Jones, supra*, the Court conducted an extensive analysis of the scope of the thirteenth amendment and noted that:

> The Thirteenth Amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free, by securing to all citizens, of every race and color, "the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." 109 U.S., at 22.

392 U.S. at 441 n. 78.

Although the thirteenth amendment, by its own terms, prohibits the imposition of the condition of slavery on any person, the grant of power to Congress to pass legislation pursuant to the amendment was limited to the eradication of the badges of slavery as practiced at that time, *i.e.*, slavery on the basis of race and color. As a result, the thirteenth amendment, as interpreted in *Jones*, only authorizes remedial legislation which prohibits discrimination on the basis of race or color. See Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 Harv. L. Rev. 1294, 1315 (1969).

Consequently, this Court has consistently held that civil rights statutes which look to the thirteenth amendment as their source of congressional power are limited to discrimination on the basis of race or color. *E.g., Runyon v. McCrary*, 427 U.S. 160 (1976) (42 U.S.C. § 1981 limited to racial discrimination); *Jones, supra* at 413 ("the statute in this case [42 U.S.C. § 1981] deals only with racial discrimination

and does not address itself to discrimination on grounds of religion or national origin".[41]

Cases limiting the scope of the remedial legislation passed pursuant to the thirteenth amendment are totally consistent with judicial decisions which have described the limits of the amendment itself. In *United States v. Cruikshank*, 25 F. Cas. 707 (C.C.La. 1874), *aff'd*, 92 U.S. 542 (1876), Mr. Justice Bradley, sitting on the circuit, dismissed an indictment under Section 6 of the 1870 Act (which closely parallels the language of Section 1985(3)) for failure to allege that racial prejudice was the sole motivation for the conspiracy. It was only such private action that Congress could prohibit under the thirteenth amendment.

Similarly, in *United States v. Harris*, 106 U.S. 629 (1883), the Court declared the criminal counterpart to Section 1985(3), R.S. § 5519, unconstitutional because it potentially applied to conspiracies by whites against whites as well as blacks. *Accord, Le Grand v. United States*, 12 F. 577 (C.C.E.D. Tex. 1882). *Cf. United States v. Reese*, 92 U.S. 214 (1876) (Section 3 and 4 of the 1870 Act, passed pursuant to the fifteenth amend-

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[41] The Third Circuit's opinion suggests that sex discrimination should be cognizable under Section 1985(3) because it is cognizable under Section 1983. Section 1983, however, does not look to the thirteenth amendment as its source of congressional power. The source of Section 1983, as indicated by its "under color of state law" language is the fourteenth amendment. *Monroe v. Pape*, 365 U.S. 167 (1961). As this Court warned in the *Civil Rights Cases*, 109 U.S. at 23:

> We must not forget that the province and scope of the 13th and 14th Amendments are different . . . The Amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other.

ment, are unconstitutional because they are not limited to racial discrimination).[42]

Thus, when the source of constitutional power invoked under Section 1985(3) is the thirteenth amendment, the analysis can be quite simplified. In *Dombrowski, supra,* 459 F.2d at 195, Judge (now Mr. Justice) Stevens noted that the plaintiff was white and there could be no allegation of racial motivation behind the refusal of the alleged conspiracy to rent office space to him. The thirteenth amendment, therefore, could not provide a basis of constitutional power to provide a remedy for the acts of the private conspiracy, and the Section 1985(3) cause of action was dismissed.

Similarly, in this case the class allegedly subject to invidious discrimination is not a "racial" group. Nor is it a group "chafing under the hands of involuntary servitude."[43]

All of this precedent has consistently interpreted the purpose of the thirteenth amendment to be the abolition of the pervasive effects of centuries of slavery on the basis of race.

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[42] In *Griffin*, it was noted that the *Harris* Court followed a rule of severability that required invalidation of a statute if any part of it was unconstitutionally overboard, unless its different parts could be read as wholly independent provisions. 403 U.S. at 88. The *Griffin* Court also suggests that the only redeeming factor for the constitutionality of Section 1985(3) is the fact that this severability rule is no longer followed. *Id.* ("[W]e need not find the language of § 1985(3) now before us constitutional in all its possible applications"). It is significant, however, that the *Griffin* Court anticipated the possibility that Section 1985(3) can be unconstitutionally applied. One such application would be the Third Circuit's extension of the statute to sex discrimination in private employment.

[43] The fact that you do not like every aspect of employment where you work does not mean that you are a slave. If you have the freedom to quit, you are not subject to involuntary servitude. *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964); *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970), *aff'd*, 407 U.S. 258 (1972). There is no condition of slavery or involuntary servitude even allegedly present in this case.

Despite the "poetic license" taken in the plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973), at the time the thirteenth amendment was passed, women as a class were not the subjects of institutionalized slavery as contemplated by Congress. Obviously, then, the congressional power to adopt remedial legislation pursuant to the amendment was never intended as a remedy for sex discrimination.

In *Jones, supra,* 392 U.S. at 440, the Court carefully noted the statement of Senator Trumbull, the Chairman of the Judiciary Committee:

> I have no doubt that under this provision . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. *It was for that purpose that the second clause of that amendment was adopted.* . . .

Cong. Globe, 39th Cong., 1st Sess. 322 (emphasis added).

Women were simply not intended to be the beneficiaries of remedial legislation under the thirteenth amendment, and there is no judicial support or reason for the proposition that sex discrimination in private employment is cognizable under Section 1985(3) due to congressional power under the thirteenth amendment.[44] Sex discrimination, therefore, is not a cognizable class under Section 1985(3) to the extent the statute looks to the thirteenth amendment as a constitutional source of power.

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[44] The fact that 42 U.S.C. § 1981 has been interpreted to make all facets of racial discrimination actionable, *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), does not lend any support to the proposition that such remedial statutes, and the thirteenth amendment in general, prohibit sex discrimination in private employment. That proposition has been uniformly rejected. *See, e.g., League of Academic Women v. Regents of University of California*, 343 F. Supp. 636 (N.D. Cal. 1972).

B. The Fourteenth Amendment Does Not Provide A Source Of Power To Remedy Discrimination By A Private Employer.

In *Griffin*, the Court declined to define the scope of Section 1985(3) if the source of congressional power under consideration was the fourteenth amendment. 403 U.S. at 107. Prior decisions, however, have clearly limited that amendment to circumstances involving some form of state action.

Soon after passage of the fourteenth amendment, the Court addressed its scope in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). A majority of the Court held that the purpose of the amendment was to protect the privileges and immunities of citizens of the United States from hostile legislation by the states:

> If the States do not conform their laws to its requirements, then, by the 5th section of the article of Amendment, Congress was authorized to enforce it by suitable legislation.

83 U.S. at 81.

Similarly, in *United States v. Cruikshank, supra,* Chief Justice Waite held that:

> The 14th Amendment prohibits a State from depriving any person of life, liberty or property without due process of law, but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.

92 U.S. at 554. *See also United States v. Harris, supra.*

In the *Civil Rights Cases, supra,* the Court declared the Civil Rights Act of 1875 unconstitutional because it prohibited discrimination on the basis of color by owners of private inns and theatres. In considering whether the legislation could be

sustained under the fourteenth amendment, Mr. Justice Bradley held as follows:

> It is state action of a particular character that is prohibited. *Individual invasion of individual rights is not the subject matter of the Amendment.* It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the Amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state Acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the Amendment. Positive rights and privileges are undoubtedly secured by the 14th Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must, necessarily, be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect.

109 U.S. at 11-12 (emphasis added).

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court again emphasized:

> Since the decision of this Court in the Civil Rights Cases, 1883, 109 U.S. 3 [3 S.Ct. 18, 27 L.Ed. 835], the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

334 U.S. at 13 (footnote omitted).

This clear precedent led both the Courts of Appeals for the Seventh and Fourth Circuits to expressly hold that state action must be present if the individual or class right violated relies on the fourteenth amendment as a source of congressional power under Section 1985(3). *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972); *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Murphy v. Mt. Carmel High School*, 543 F.2d 1189 (7th Cir. 1976); *Bellamy v. Mason's Stores*, 508 F.2d 504 (4th Cir. 1974). *See also Lopez v. Arrowhead Ranches*, 523 F.2d 924, 927 n. 3 (9th Cir. 1975).

In *Dombrowski, supra*, Judge (now Mr. Justice) Stevens noted:

> The breadth of the statute's coverage is yet to be determined, but three categories of protected rights have been plainly identified. *Griffin* gives express recognition to a black citizen's Thirteenth Amendment rights and to his federal right to travel interstate; the title of the statute expressly identifies the third category, namely, rights protected by the Fourteenth Amendment. We think the § 1983 cases make it clear that in this third category a 'state involvement' requirement must survive *Griffin*.
>
> * * *

> Since the Fourteenth Amendment, unlike the Thirteenth, affords the plaintiff no protection against discrimination in which there is no state involvement of any kind, a private conspiracy which arbitrarily denies him access to private property does not abridge his Fourteenth Amendment rights.

459 F.2d at 195-96 (footnote omitted).

The only court of appeals to hold that the fourteenth amendment will support a cause of action against a private conspiracy under Section 1985(3) was the Eighth Circuit in *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971).[45] In *Action* the court determined that Congress was given the power in Section 5 of the fourteenth amendment to enforce rights guaranteed by the amendment against private conspiracies. The court reached this conclusion, despite the more than fifty years of Supreme Court precedent to the contrary, on the basis of *dicta* in concurring opinions in *United States v. Guest*, 383 U.S. 745 (1966).[46]

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[45] An earlier decision of the Third Circuit in *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971), is sometimes cited in support of the proposition that violation of fourteenth amendment rights by private persons may be actionable under Section 1985(3) because the plaintiff therein alleged a violation of his first amendment rights. The *Richardson* decision, however, did not consider that issue.

In *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir.) *vacated as moot*, 507 F.2d 215 (5th Cir. 1975) (*per curiam*), a Fifth Circuit panel decided that private persons could be held liable for violations of fourteenth amendment rights under Section 1985(3). This opinion was withdrawn by the court *en banc*, however, "so that it will spawn no legal precedents." 507 F.2d at 216. Subsequently, the Fifth Circuit seems to have adopted a much narrower view of Section 1985(3) in *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (*en banc*), by requiring that the conspiracy must violate the right involved by "independently unlawful conduct."

[46] In the concurring opinions in *Guest*, six Justices (Warren, Black, Douglas, Clark, Brennan and Fortas) expressed the general view that Section 5 of the fourteenth amendment empowers Congress to pass laws punishing all conspiracies which interfere with the exercise of fourteenth amendment rights. These views, however, were strictly *dicta* since the plurality opinion found the presence of state action on the facts of the case.

As a result of its reliance on the *Guest dicta* alone, the superficial rationale developed in *Action* has been severely criticized by commentators and courts alike. *See, e.g.*, Note, *Application of 42 U.S.C. § 1985(3)*, 47 N.Y.U. L. Rev. 584 (1972); Note, *Federal Power To Regulate Private Discrimination*, 74 Colum. L. Rev. 449, 516 (1974); Note, *Private Interference With An Individual's Civil Rights: A Redressable Wrong Under § 5 Of The Fourteenth Amendment*, 51 Notre Dame Law. 120, 134 (1975); Note, *The Scope of Section 1985(3) Since Griffin v. Breckenridge*, 45 Geo. Wash. L. Rev. 239 (1977); *Bellamy, supra; Murphy, supra.*

One of the primary problems with the reasoning in *Action* is its assumption of the determinative question—even if Congress has the power to legislate proscriptions against individual violations of fourteenth amendment rights, was Section 1985(3) intended to be such legislation?

As previously discussed, however, 1985(3) is purely *remedial* and cannot be interpreted as substantive legislation which extends the Bill of Rights to proscribe private conduct. Section 1985(3), therefore, must look to the provision of another source for the right to be vindicated, and if that source is the fourteenth amendment, state action must be present. *Bellamy, supra*, 508 F.2d at 507; *Murphy, supra*, 543 F.2d at 1193.

In *District of Columbia v. Carter*, 409 U.S. 418 (1973), this Court held that "the commands of the Fourteenth Amendment are addressed only to the state or those acting under color of its authority." *Id.* at 423. Mr. Justice Brennan, speaking for the Court, noted that his concurrence in *Guest* is limited to the proposition that Congress *may* proscribe purely private conduct under Section 5 of the fourteenth amendment. *Id.* at 424 n. 8. Significantly, however, 42 U.S.C. § 1983 was held in *Carter* not to be such a proscription.

There is likewise no basis for interpreting 42 U.S.C. § 1985(3) as a proscription of private interference with first or fourteenth amendment rights.

Even though sex is a cognizable class under the fourteenth amendment (*Frontiero, supra*) and one may have a right to be free from sex discrimination in *public* employment under the fourteenth amendment (*Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1973)), there is no basis for holding alleged sex discrimination in *private* employment actionable under the fourteenth amendment and, therefore, no basis for holding sex discrimination in private employment actionable under Section 1985(3).

As the Ninth Circuit concluded in *Lopez, supra:*

> We do not think that a constitutional right to be free from discrimination when seeking public employment coupled with § 1985(3) translates into a right to be free from discrimination when seeking private employment. The benefit of the constitutional right in relation to the state is protected by discrimination-free public hiring and is relatively divorced from private hiring decisions; in that light we think § 1985(3) can at most be read to prohibit discriminatory private interference in public hiring.

523 F.2d at 927 n. 3. *See also Doski, supra*, 539 F.2d at 1333 ("[W]e hold that totally private employment discrimination on the basis of sex does not state a cause of action under 42 U.S.C. § 1985(3) for violation of rights flowing directly and exclusively from the Fourteenth Amendment").

There is no constitutional source of power, therefore, to reach a private conspiracy to deny women equal employment opportunity under Section 1985(3).

Conclusion

For the foregoing reasons, Petitioners respectfully request that the opinion and order entered by the United States Court of Appeals for the Third Circuit in this matter be reversed.

Respectfully submitted,

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